



**Republic v Attorney General & 3 others; Nganga (Applicant) (Environment and Land
Judicial Review Case E001 of 2023) [2024] KEELC 1215 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1215 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**

JM MUTUNGI, J

MARCH 7, 2024

**IN THE MATTER OF AN APPLICATION FOR LEAVE BY STEPHEN
NGANGA KIMANI TO APPLY FOR JUDICIAL REVIEW AND FOR
ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF LAND PARCEL, RICE HOLDING NO.
1501 THIBA SECTION IN MWEA IRRIGATION SCHEME
NOW SUBDIVIDED AND KNOWN AS NO. 1501 A AND 1501 B.**

AND

**IN THE MATTER OF WANG'URU RESIDENT MAGISTRATES COURT
MISC. SUCCESSION NO. 29 OF 1977 – THE MANAGER, MWEA
IRRIGATION SETTLEMENT SCHEME –VS- NGANGA KIMANI(DECEASED)**

AND

**IN THE MATTER OF PREROGATIVE ORDERS FOR
CERTIORARI, PROHIBITION AND MANDUMUS.**

IN THE MATTER OF THE REPUBLIC

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

MAINA NGANGA2ND RESPONDENT

ELIUD MWAURA 3RD RESPONDENT

ANN NDUTA NGANGA 4TH RESPONDENT

AND

STEPHEN KIMANI NGANGAAPPLICANT

BETWEEN



REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

MAINA NGANGA 2ND RESPONDENT

ELIUD MWAURA 3RD RESPONDENT

ANN NDUTA NGANGA 4TH RESPONDENT

AND

STEPHEN KIMANI NGANGA APPLICANT

JUDGMENT

1. The *Exparte* Applicant on 16th March 2023 was granted leave to institute Judicial Review proceedings. He was directed to file the substantive Notice of Motion within 21 day of the grant of leave and to effect service of the same on the Respondents.
2. The *Exparte* Applicant in compliance with the directions of the Court filed the Notice of Motion dated 27th March 2023 on the same date and effected service of the same on the Respondents on diverse dates. By the Notice of Motion the *Exparte* Applicant prayed for the following orders:-
 1. That an order of *Certiorari* do issue to remove and bring up into the Environment and Land Court and quash all the proceedings taken and orders given before the Resident Magistrate's Court Wang'uru from the 30th September 2004 to 30th April 2019 and all orders given consequent upon the said proceedings and in particular the orders given on 30th September 2004 by the Hon. P. T. Nditika, the orders given on the 8th September 2009 and 7th October 2009 by the Hon. B. M. Ochoi.
 2. That an Order of Prohibition do issue to restrain the Resident Magistrate, Wang'uru or the Mwea Irrigation Scheme from enforcing, maintaining any enforcement and cancelling any such enforcement of any of the orders given in Wang'uru Resident Magistrate's Court in Misc. Succession Case No. 29 of 1977 between the 30th September 2004 and 7th October 2009.
 3. That an order of *Mandamus* do issue directed to the Resident Magistrate Wang'uru compelling that Court to forthwith cease undertaking any proceedings in Wang'uru Misc. Succession Cause No. 29 of 1977.
 4. That the costs of these proceedings be provided for.
3. The application was premised on the following grounds set out on the body of the application:-
 - a. The Resident Magistrate Wang'uru proceeded with the re-opening on application by persons who were not party to the proceedings of a matter which it had recorded and given an order by consent on 25th August 1977 on 29th September 2004 – 27 years after the determination of the matter which re-opening was undertaken without jurisdiction and while the Court was *functus officio*.
 - b. The Wang'uru Resident Magistrate's court undertook proceedings 27 years after conclusion of the matter on 25th August 1977 while it had no jurisdiction to do so and which was *ultra-vires*.



- c. The proceedings undertaken and orders given by the Resident Magistrates Court Wang'uru between the 30th September 2004 and 7th October 2009 went against the principle of legitimate expectation by entertaining the reopening of a matter 27 years after its conclusion whether merited or not and which proceedings were undertaken against the principles of natural justice and without regard to the principles governing the rules of natural justice.
 - d. The proceedings, orders and decisions cited above were unreasonable and violated the legitimate expectation of the Applicant.
 - e. Further reasons and grounds are set out in the statement and affidavit of the *Ex-parte* Applicant Stephen Kimani Nganga attached to this application.
4. The application was further supported on the Supporting Affidavit of the *Exparte* Applicant sworn on 27th March 2023 which basically reiterated the contents of the Affidavit sworn in support of the application for leave and the statement that accompanied the application for leave. The Chamber Summons and the Affidavit in support was annexed as Exhibit "SKN 2" while the Affidavit in support was annexed as exhibit "SKN 3". The *Exparte* Applicant further relied on the contents of the further Affidavit sworn by the *Exparte* Applicant on 17th May 2023.
 5. The 2nd and 3rd Respondents in opposition to the Applicants Notice of Motion filed a Replying Affidavit sworn by the 2nd Respondent on 5th May 2023. The Attorney General and the 4th Respondent though served did not file any pleadings and/or participate in the proceedings.

The *Exparte* Applicant's Case.

6. The *Exparte* Applicant's case is that the Magistrate's Court at Wang'uru on 25th August 1977 dealt and disposed off the Succession of Riceholding No. 1501 Thiba Section whereby the *Exparte* Applicant who was then a minor was allowed by consent of the parties to succeed the Riceholding under the guardianship of Anah Nduta Nganga who was his mother. The Applicant averred that the order given on 25th August 1977 was executed and that Riceholding No. 1501 was duly registered in the name of Ann Nduta Nganga as guardian for the *Exparte* Applicant ("SNK 7") until 16/6/2009 when Ann Nduta Nganga and the Applicant were registered as joint owners as per documents exhibited as "SNK 8" and "SNK9" following surrender by the Applicant of a portion of 3 Acres to Ann Nduta Nganga vide an Affidavit sworn on 22nd July 2004 exhibited as "SNK10".
7. The *Exparte* Applicant contends that notwithstanding that the Wang'uru Magistrate's Court became functus officio after it decided on the succession of Riceholding 1501 Mwea Irrigation Settlement Scheme, on 25th August 1977, one Maina Nganga and Eliud Mwaura vide an application dated 29th September 2004 applied to have the orders given on the 25th August 1977 reviewed. The Applicants in the application sought to have the orders reviewed and revoked and the Riceholding No. 1501 – Thiba Section subdivided into two portions and one of the portions to be registered in their names.
8. The Applicant contends the application for review was made by the persons who were not party to the proceedings where the consent order on succession of the Riceholding was made on 25th August 1977 and that the application was entertained by the Court when it lacked the jurisdiction to do so. The Applicant thus averred the orders of review that the Court granted were null and void abinitio and of no legal effect. He averred that at any rate the consent order awarding the Riceholding No. 1501 to the Applicant made 27 years earlier in 1977 had already been implemented and could not be reviewed. He averred he in July 2004 entered into an arrangement with his stepmother Ann Nduta who had acted as his guardian to exchange a portion of the Riceholding with her land parcel number Ruiru/Ruiru



East Block 2/3809 as detailed in his affidavit sworn in support of the exchange/surrender on 22nd July 2004 (“SKN 12”).

9. The Applicant further averred that owing to the illegal and unlawful order of the Wang’uru Magistrate’s Court exercising a jurisdiction they never had, to review the Court order of 25th August 1977, he had not only lost his inheritance of the Riceholding but also the parcel of land that he had agreed to exchange with his stepmother for a portion of the Riceholding. He averred further that this Court had supervisory jurisdiction to review decisions of the Subordinate Court and urged the Court to exercise its powers of review and quash the subordinate Court’s illegal orders of review.

The 2nd Respondent and 3rd Respondent’s Case.

10. The 2nd Respondent on behalf of himself and the 3rd Respondent filed a Replying Affidavit sworn on 5th May 2023 in opposition to the *Exparte* Applicant’s application. They averred there was inordinate delay in instituting the application for Judicial Review on the part of the Applicant which they averred ought to have been brought within six(6) months of the orders having been issued. The 2nd and 3rd Respondents on their part averred that they filed the application seeking review of the orders issued by the Wang’uru Court on 25th August 1977 since they were affected by the orders. They argued the Court granted their request for review and that the Applicant applied to set aside and/or review the orders of review granted by the Court and his application was dismissed on the basis that it lacked merit. The 2nd and 3rd Respondents averred the Applicant was represented by an Advocate when the application for review and the subsequent applications were heard before the Wang’uru Magistrate’s Court and hence cannot allege he was condemned unheard contrary to the rules of natural justice.
11. The 2nd and 3rd Respondent contended that the *exparte* Applicant even after his application to review and set aside the order given by the Wang’uru Magistrate’s Court was dismissed, filed before the ELC Court at Kerugoya ELC No. 10 of 2020 that the Court dismissed for being resjudicata vide a Ruling delivered by Cheronon, J on 15th July 2022. It was the 2nd and 3rd Respondents view that the *Exparte* Applicant was vexing them with litigation and sought to have the Applicant declared a vexatious litigant.
12. The 2nd and 3rd Respondent maintained that the *Exparte* Applicant was registered to hold the Riceholding in trust for himself and themselves and averred that as they were persons who were directly affected by the decision giving the land to the Applicants, they were justified in applying for its review before the Court that made the decision. They contended the Applicant ought, if he was dissatisfied with the decision of the Wang’uru Magistrate’s Court, to have appealed against the decision but not to apply for Judicial Review. The applications before the Wang’uru Magistrate’s Court were heard and determined on merit and consequently could only be subject to appeal and not review.
13. The parties canvassed the application by way of written submissions. The Applicant’s submissions dated 6th July 2023 were filed on 11th July 2023 while the 2nd and 3rd Respondents submissions were filed on 30th August 2023.

Submissions of the Exparte Applicant.

14. The Exparte Applicant in his submissions reiterated that the Wang’uru Magistrate’s Court acted without jurisdiction when it purported to review the order made by the Court on 25th August 1977. The Exparte Applicant argued that the deceased Nganga Kimani who was the licensee of the Riceholding had appointed his successor and that the Mwea Irrigation Scheme Manager referred the issue of the successor to Court vide Wang’uru Misc. Succession Cause No. 29 of 1977 to have the nomination validated. He contended that the order given on 25th August 1977 concluded the matter



and the order was given effect as the Applicant was registered as licensee of Riceholding No. 1501 on 31st August 1977 and henceforth the Court ceased to have further jurisdiction over the matter. The Applicant submitted that the Court's jurisdiction was limited under Regulation 7 of the Irrigation (National Irrigation Scheme) Regulations, 1977 to affirming the nomination of a successor and once that was done the Court retained no further jurisdiction.

15. The Applicant further submitted that the 2nd and 3rd Respondents having not participated in the proceedings that resulted in the consent that culminated in the nomination of the Applicant as successor of the Riceholding on 25th August 1977 could not have locus to apply for the order recorded by consent to be reviewed. That notwithstanding the Applicant maintained that the order of 25th August 1977 having been made by consent could only have been set aside on grounds that would have justified the setting aside of a contract entered into legally by competent parties which threshold was not attained by the 2nd and 3rd Respondents in their application dated 29th September 2004. In support of this submission the Applicant placed reliance on the Case of *Flora N. Wasike -v- Destimo Wamboko* (1988)eKLR.
16. The Applicant further in his submissions opined that the procedure available to the 2nd and 3rd Respondent's was one of Judicial Review and not one for Review before the Wang'uru Magistrate's Court as that Court lacked jurisdiction and had as well become functus officio. The Applicant relied on the provisions of the *Fair Administrative Actions Act*, 2015 Section 7 to support his submission. The Applicant relied on other authorities to support the assertion that where a court renders a decision without jurisdiction such decision is null and void and *ultra vires* and hence of no legal effect. These decisions included *Republic -v- Principal Kadhi Mombasa & Anor; Exparte Alibhai Adamali Dar & 2 Others* (2022) eKLR; *Samuel Kamau Macharia & Another -v- Kenya Commercial Bank & 2 Others* (2012) eKLR; *Esther Victoria Wanjiku Muhoro -v- Mary Wambui Gitinji & 3 Others* (2021) eKLR and *Martha Mwonjaru -v- M'runyati M. Kiricha (deceased) & another* (2010)eKLR.
17. The Applicant consequently submitted that even though the 2nd and 3rd Respondents have become registered as licensees and new numbers issued in respect of Riceholding No. 1501 they have acquired no proprietary interest since the order vide which they were registered was null and void and of no legal effect and could pass no legal interest. They argued that as the order of review was a nullity nothing could come out of it and that the maxim "*ex-nihilo nilil fit*" was applicable that "out of nothing comes nothing." The Applicant thus urged that the orders of 7th October 2009 be quashed and the Notice of Motion dated 27th March 2023 be allowed.

Submissions of the 2nd and 3rd Respondents

18. The 2nd and 3rd Respondents submitted that the Applicants application for Judicial Review was made out of time as the impugned orders sought to be quashed were made between the period 2004 and 2009. The Respondents argued under Order 53 Rule 2 such an application ought to have been made within a period of 6 months from the date of the proceedings/order complained about. Order 53 Rule 2 of the *Civil Procedure Rules* provides as follows:-

Order 53 Rule 2

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.



The 2nd and 3rd Respondents further submitted the Applicant had not been nominated by the licensee as successor pursuant to Regulation 7(2) of the Irrigation (National Irrigation Schemes) Regulations, 1977 as argued by the Applicant. If he had been so nominated there would have been no necessity for the matter to go to Court. The 2nd and 3rd Respondents proceeded at the Wang’uru Magistrate’s Court under Regulation 7(4) of the *Irrigation (National Irrigation Schemes) Regulations* 1977 which applied where a licensee of a Riceholding died without nominating a successor Regulation 7(4) provides as follows:-

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- (4) The authorized dependent may –
- a. where a licensee dies without having nominated a successor in accordance with paragraph 1 or;
 - b. where under paragraph (3) an appeal to the Court against the nomination of a successor has been successful;

Within one month of the death of the licensee or one month after the determination of the appeal, as the case maybe, nominate, in writing to the Manager a successor who must be approved by the Court.”

19. The 2nd and 3rd Respondent thus argued the Court exercised jurisdiction under Regulation 7(4) of the Regulations which had no provision to appeal. Only nominations of successor made under Regulation 7(1) of the Regulations were appealable to the Court under Regulation 7(3) of the Regulation. The 2nd and 3rd Respondents therefore submitted that they properly applied for review of the consent order before the Court that had endorsed it.
20. The 2nd and 3rd Respondents further submitted that the Fair Administrative Actions Act, 2015 which the Exparte Applicant cited to anchor the application on could not have any application as the acts complained about occurred long before it was enacted and it could not be applied retrogressively. At any rate the Respondents argued the provisions of Section 7 of the *Fair Administrative Actions Act*, 2015 could not apply in the circumstances of the present case since the Wang’uru Magistrate’s Court had the jurisdiction to entertain and deal with the application for review presented before it by the Respondents.
21. The Respondents maintained that the Wang’uru Resident Magistrate’s Court properly exercised its discretion and submitted that the Applicant’s instant application is but a disguised appeal against the decision of the Magistrate’s Court’s decision. The Respondents urged that the Exparte Applicants application be dismissed with costs.

Analysis and determination

22. I have reviewed and considered the Notice of Motion the Affidavits in support and in opposition and I have considered the submissions made on behalf of the parties. The issues that arise for resolution are whether the Magistrate’s Court at Wang’uru had jurisdiction to entertain the application for review; whether the application before the Magistrate’s Court was made within a reason time; whether the present application offends the provisions of Order 53 of the *Civil Procedure Rules* as relates to the period within which the application was brought; and whether the *Fair Administrative Actions Act*, 2015 was applicable.



Jurisdiction of the Magistrate's Court.

23. The Exparte Applicant has submitted that the Wang'uru Magistrate's Court had no jurisdiction to entertain the application dated 29th September 2004 that resulted in the impugned orders. The application sought to have the orders made by the Court on 25th August 1977 reviewed and to have Riceholding No. 1501 Thiba Section subdivided into two equal portions. The application was based on the grounds outlined on the body of the application and the supporting Affidavit by Maina Nganga, the 2nd Respondent herein. The application was made under Order XLIV Rule 1 (presently Order 45 Rule 1) of the Civil Procedure Rules.
24. The application in the first instance was allowed by the Court on 26th November 2004 but upon application by the 2nd Respondent (Stephen Kimani Nganga) the Exparte Applicant herein, the orders made by the Court on 26th November 2004 were set aside vide a ruling dated 22nd December 2008 but delivered on 10th February 2009. The application dated 29/9/2004 was fixed for hearing on 18/8/2009 and the exparte Applicant who had not filed a Replying Affidavit as at 28/7/2009 was granted leave to do so but on the date of the hearing neither the exparte Applicant (2nd Respondent) or his Advocate attended. The exparte Applicant had also not filed a Replying Affidavit. The application was heard exparte and the Senior Resident Magistrate delivered a Ruling on 8/9/2009 allowing the application dated 29/9/2004 as prayed with costs. The exparte Applicant once more applied vide an application dated 13th July 2018 (9 years later) to have the consequential order issued on 7th October 2009 set aside. The application was dismissed by the Court on 9th November 2018 after a considered Ruling.
25. The Court has chosen to highlight the sequence of events as evidenced by the Court record to contextualize the instant application as it is those actions that have precipitated the present application. The issue whether the Magistrate's Court had jurisdiction has been canvassed extensively by the parties in their submissions and it is now opportune to deal with it.
26. It is not in dispute that what was in issue before the Wang'uru Magistrate's Court was the nomination of a successor of Rice Holding No. 1501 after the death of the Licensee. The Licensee in the instant case had not exercised his right to nominate a successor under Regulation 7(1) of the Irrigation (National Irrigation Schemes) Regulations, 1977. In the circumstances the nomination of a successor could only be initiated by "authorized dependent" under the provisions of Regulation 7(3) and (4) which provide as follows:-

7 ...

- (3) The authorized dependent of a deceased licensee may, within thirty days of his death, appeal to the Court against the nomination, under paragraph (1), of a successor.
- (4) The authorized defendant may –
- (a) where licensee dies without having nominated a successor in accordance with paragraph (1); or
 - (b) where under paragraph (3) an appeal to the Court against the nomination of a successor has been successful,

Within one month of the death of the licensee or one month after the determination of the appeal, as the case maybe, nominate, in writing to the Manager, a successor who must be approved by the Court.



27. On the basis of the foregoing provision and more particularly Regulation 7(4)(a) of the Regulations, the matter of nomination of a successor was properly referred to the Wang'uru Magistrate's Court vide Succession No. 29 of 1977. The Court therefore had jurisdiction to entertain the matter to validate the nomination of the Successor of Riceholding No. 1501 within Mwea Irrigation Scheme.
28. Having come to the conclusion that the Wang'uru Magistrate's Court was properly seized of the matter in 1977 when it validated the nomination of the Applicant as the successor of Riceholding No. 1501 through the guardianship of his mother, Ann Nduta, it follows that an application for Review anchored under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* would be available to any party who considered themselves to be aggrieved by the decision/order. The 2nd and 3rd Respondents were in my considered opinion within their right to apply for review of the Wang'uru Magistrate's Order on nomination of the successor of the Riceholding No. 1501. Whether or not the application was merited was beside the point.

The Applicant has strongly argued that the 2nd and 3rd Respondents having not been parties to the consent order that the Magistrate's Court recorded on 25th August 1977 lacked the locus standi to seek to have the same reviewed. Under Section 80 of the *Civil Procedure Act* and the previous Order XLIV Rule 1 (the current Order 45 Rule 1) of the *Civil Procedure Rules* for a person to seek a review of an order/decre, such person need not have been a party to the proceedings in which the order/decre was made. Section 80 of the *Civil Procedure Act* provides as follows:-

80. Review

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:-

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(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

29. The criteria for who can apply for review is that the person is affected and considers himself aggrieved by the order sought to be reviewed. The 2nd and 3rd Respondents claimed that the Applicant was their stepbrother from their father's other wife and that the succession was made without consideration of their household as they were also entitled to a share of the Riceholding as beneficiaries of their deceased father.



30. The Court heard the application dated 29th, September 2004 to which apparently the Applicant though he was represented by Counsel filed no Replying Affidavit inspite of having been granted leave to do so. The application was allowed on 8th September, 2009. The Applicant's application dated 13th July 2018 seeking a review of the orders that emanated from the 2nd and 3rd Respondents application dated 29th September, 2004 was declined by the Court on 9th November 2018.
31. The Applicant, it does appear, after his application to have the Respondents order granting them a share of the Riceholding reviewed, failed, he opted to institute Judicial Review proceedings to have the orders quashed. The Applicant clearly was doing trial and error considering that he had previously filed Kerugoya ELC No. 10 of 2020 on the same subject matter which the Court declared was *Res judicata*. The Judicial Review application was brought under the Constitution Article 47 and the Fair Administrative Actions Act and Order 53 Rules (1)(2) and (4) of the Civil Procedure Rules.
32. The 2nd and 3rd Respondents have argued that the application for Judicial Review was statute barred as the leave was not sought before the expiry of six(6) months from the date the order was made. The Respondents submitted that the proceedings offended the provisions of Order 53 Rule 2 of the Civil Procedure Rules which provides as follows:-
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- (2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
33. The order that reviewed the order nominating the exparte Applicant as successor of Riceholding 1501 was made on 8th September 2009 and there was participation by both the Applicant and the 2nd and 3rd Respondents in the proceedings resulting in the order. The Law Reform Act, Cap 26 Laws of Kenya provided for the applicable substantive law in applications for certiorari prohibition and Mandamus before the enactment of the Fair Administrative Actions Act, 2015. Section 9(3) of the Law Reform Act provides as follows:-
- 9 ...
- (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
34. The Fair Administrative Actions Act, 2015 was enacted to give effect to Article 47 of the Constitution of Kenya 2010. The actions complained about in this matter occurred between 2004 and 2009. The operative provisions of the law then in regard to Judicial Review provisions were the Law Reform Act, Cap 26 Laws of Kenya, Sections 8 and 9 and Order 53 Rule 2 of the Civil Procedure Rules. The Fair



Administrative Actions Act, 2015 did not have retrogressive application so that it could override the applicable laws before its enactment. I hold in the instant matter it has no application.

35. Both Order 53 Rule 2 and the Law Reform Act Section 9(3) provide in mandatory terms that leave to institute Judicial Review shall not be granted where the order or decision sought to be quashed is a Judgment, order/decreed or conviction unless the application for leave is made not later than six months after the date of the proceeding.
36. The Applicant has countered the Respondents argument on the issue of the application for leave having been brought out of time and has argued that where the order was made without jurisdiction the Limitation period of 6 months does not apply. The Applicant relied on the Case of *Republic –v- Land Disputes, Central Division & Another* (2006) 1 KLR 475 and the Case of *Republic –v- Kenyatta University* (2009) eKLR. In the two cases the Court took the position that where the impugned decision was made without and/or in excess of jurisdiction, the limitation period of six months would be inapplicable.
37. In the present case, Wang’uru Magistrate’s Court had jurisdiction to entertain the application seeking review being the Court that had made the orders that sought to be reviewed. The authorities referred to the Court by the Applicant would therefore have no application.
38. The Applicant has further submitted that since leave was granted by the Court and had not been challenged, the Respondents argument on Limitation of time is untenable. The leave was granted by the Court at the ex parte stage and that cannot bar the Respondents from contesting the grant of leave in their defence. Under paragraph 5 of the Replying Affidavit the 2nd Respondent averred that the Judicial Review proceedings should have been commenced within a period of 6 months. I am in the premises persuaded, the Applicant ought to have commenced Judicial Review proceedings within six months of the order made by the Wang’uru Magistrate’s Court on 8th September, 2009. The Judicial Review application as presented was therefore incompetent and misconceived.
39. The upshot is that I hold the Notice of Motion dated 27th March 2023 to be lacking in merit and order the same dismissed. The parties will bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK THIS 7TH DAY OF MARCH 2024.

J. M. MUTUNGI

E.L.C - JUDGE

